TAN CHIANG BROTHER'S MARBLE (S) PTD LTD

v.

LIGHTWEIGHT CONCRETE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[SUIT NO: D5-22-425-1994]
30 APRIL 1996

CIVIL PROCEDURE: *Writ of summons - Service - Denial of service - Whether there was service - Whether endorsement of denial necessary*

CIVIL PROCEDURE: *Writ of summons - Commencement of action - Letters of demand - Whether refusal to reply infers admission of claim*

CIVIL PROCEDURE: *Judgment - Default judgment - Setting aside - Defence on the merits - Arguable and triable issues - Whether must show real prospect of success*

ARBITRATION: *Agreement - Whether contract provided for arbitration - Whether stay of execution of proceedings allowed - Arbitration Act 1952, s. 6*

The plaintiff had filed a claim against the defendant for breach of contract, due to non-payment of goods supplied, and had obtained judgment in default of appearance of the defendant. The defendant applied to set aside the default judgment on the ground that the writ was not served on the defendant and further, for a stay of all proceedings pending referral of the dispute to arbitration, pursuant to the Arbitration Act 1952, s. 6 ('the Act'). The Senior Assistant Registrar refused the defendant's application and the defendant appealed.

The plaintiff denied that there was non-service of the writ and submitted that the writ was served on the company secretary, who had refused to endorse receipt of the writ. Nevertheless, the endorsement on the writ did not state that the company secretary had refused to acknowledge receipt of it. It was argued on behalf of the plaintiff that as the letters of demand were not replied, admission of the claim could be inferred from it. Additionally, the plaintiff submitted that it was not sufficient to show an arguable defence but that it must have a real prospect of success and carry some degree of conviction. The defendant submitted that there were several letters sent to the plaintiff, complaining of the poor quality of the products delivered and of the delay in the supply of the products, which had caused the defendant to incur loss.

Together with its counterclaim, the defendant claimed that it had a defence on the merits. The court had to decide: (i) whether the writ was served; (ii) whether there was a defence on the merits and; (iii) whether a stay of proceedings should be granted.

Held:

[1] The Rules of the High Court 1980, O. 62 r. 4(1) ('RHC') provides the mode of service upon a corporation. RHC O. 62 r. 4(1)(c) provides for service by handling a copy of the summons to the secretary of the company. In the present case, the process server stated that the summons was served on the company secretary, but she had refused to acknowledge receipt of it. However, as the refusal was not endorsed on the writ, the court was doubtful as to whether the writ was served.

[1a] No inference should be drawn from the unanswered letters of demand. The non-reply could equally infer admission of the claim as well as a rejection of the same. The court could not therefore infer in favour of the plaintiff.

[1b] The court will not apply the rule relating to it setting aside a default judgment, where the party, who seeks to put it in force, has, with full knowledge and wilfully, allowed judgment to go by default. In the instant case, the default was taken wilfully, without knowledge of the defendant.

[1c] The plaintiff had not made any effort to enforce payment, since obtaining the judgment. Under O. 42 r. 13 RHC, had the plaintiff served the judgment on the defendant, it (the defendant) could have applied to set the judgment aside within 30 days after receipt of the judgment.

[2] A defence on the merits means a defence which discloses an arguable and triable issue. It does not have to show that there is a real pospect of success or that it has to carry some degree of conviction.

[2a] The letters detailing defective quality of goods supplied; the delay in supplying the goods; and the counterclaim, were all triable issues and the defendant therefore had a defence on the merits.

[3] Section 6 of the Act provides that the court may make an order staying proceedings, if it is satisfied that there is no sufficient reason why the matter should not be referred, in accordance with the arbitration agreement. It is not the court's function to decide whether the defendant had raised a *bona fide* dispute warranting a stay.

[3a] The contract between the plaintiff and the defendant provided for arbitration under the Act. The court found that there was a dispute, both, with regard to the quality of the good supplied and to the delay in the supply of the same. Resulting from this finding, the defendant was entitled to rely on s. 6 of the Act and apply for a stay.

[3b] In the exercise of its discretion, the court may stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken, to go to arbitration.

[4] The court being in agreement with the proposition in *Wright v. Mills* awarded all costs to the plaintiff including the cost of the defendant's application.

[Defendant's appeal allowed.]

Cases referred to:
Evans v. Bartlam [1937] 2 All ER 646
Haigh v. Haigh [1886] 31 Ch D 478 ***(refd)***
Yew Leek Enterprise Sdn Bhd v. Foong Engineering & Construction Works Sdn Bhd [1990] 2 MLJ 62
PL Construction Sdn Bhd v. Abdullah bin Said [1989] 1 MLJ 60
Alphine Bulk Transport Co Inc v. Saudi Eagle Shipping Co Inc (The "Saudi Eagle") [1986] 2 ***(refd)***
Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 MLJ 40
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609
Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459
Hashim bin Majid v. Param Cumaraswamy & Ors [1993] 2 MLJ 20
Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena) [1996] 1 CLJ 231
Wright v. Mills [1889] 60 LTR 887

Legislation referred to:
Arbitration Act 1952, s. 6
Companies Act 1965, s. 218
Rules of the High Court 1980, O. 42 r. 13, O. 62 r. 4(1)(c)

For the respondent - Leong Wai Hong; M/s Skrine & Co
For the appellant - Gopal Sreenevasan; M/s David Morais

JUDGMENT

RK Nathan JC:

The Chronology Of Events

On 29 April 1994 the plaintiff filed a writ of summons endorsed with a statement of claim against the defendant in respect of a breach of contract

which said 'agreement' was in fact comprised in three letters dated 7 September 1992, 15 September 1992 and 17 September 1992 respectively for the supply of granite slabs by the plaintiff to the defendant. Having served the writ the plaintiff's solicitors filed a certificate of non-appearance on 23 August 1994 and on the same day the learned Deputy Registrar entered judgment in default of appearance against the defendant for the sum of RM479,276.28. On 28 July 1995 the plaintiff obtained a garnishee order to show cause against one Nirwana Indah Sdn. Bhd. On 14 August 1995 the plaintiff, through their solicitors, issued a notice pursuant to s. 218 of the Companies Act 1965. On 7 September 1995 the defendant filed an application (encl. 13) to set aside the judgment in default and to stay all further proceedings pending the referral of the dispute to arbitration pursuant to s. 6 of the Arbitration Act 1952. The learned SAR who heard this application dismissed the same on 8 December 1995. The defendant appellant has appealed against this decision before me.

Service Of The Writ

In his affidavit in support of encl. 13 the project manager of the defendant affirmed that the defendant had no notice of these proceedings and that the first time the defendant had notice was on or about 4 August 1995 when the garnishee order was served on the defendant. The defendant contended that upon receipt of the garnishee order he communicated with the company secretary of the defendant who informed him that to her knowledge no writ had been served on her at the registered address of the defendant which was not the same as the business address of the defendant. He then instructed solicitors to request for copies of the relevant cause papers from the plaintiff's solicitors. The affidavit of service stated that the writ had indeed been served on the company secretary of the defendant and that she had refused to acknowledge receipt of same. However when he sought further explanation from the said secretary the latter still maintained that the writ had not been served on her.

I have perused encl. 2, ie, the affidavit of service filed by Jegatheswaran a/l Maheswaran, the process server of the plaintiff's solicitors and I reproduce his endorsement of service on the writ annexed to his affidavit of service:

PENYAMPAIAN TENTANG PENGINDORSAN

> Writ ini telah disampaikan oleh saya M. Jegatheswaran a/l Maheswaran ke atas Lightweight Concrete Sdn. Bhd. defendan yang tersebut di atas dengan menghantarkan writ tersebut secara kedua kepada Yip Siew Yoong (P) seorang Setiausaha Syarikat untuk Syarikat Defendan yang tersebut di atas yang telah

mengaku kepada saya bahawa beliau adalah Setiausaha Syarikat untuk Syarikat Defendan yang tersebut di atas di alamat Bilik 1, Tingkat 1, 306-308, Jalan Pudu, Kuala Lumpur pada hari Rabu, 11 haribulan Mei, 1994.

Diindorskan pada 11 haribulan Mei, 1994.

t.t.

Penghantar Saman.

The said endorsement does not state that the company secretary refused to acknowledge receipt of the summons. It was pertinent and necessary for the process server to have endorsed the fact of the company secretary's refusal to sign acknowledging receipt, on the writ. The absence of such a material fact can clearly give rise to a question as to whether the writ was indeed served on the company secretary. Besides O. 62 r. 4(1) of the RHC provides the mode of service upon a corporation. There is no reason for a company secretary to refuse to sign acceptance on the writ. After all, a company secretary is a paid employee of the company amongst whole multifarious duties is also to accept service of process. I do not view the non filing of an affidavit by the company secretary that she was not served with the writ as being fatal because the project manager has himself adverted to this fact having confirmed the non receipt of the writ, from his company secretary. At this stage I must consider Mr. Gopal's submission that the said secretary was not the company secretary per se but was merely rendering secretarial services. I cannot accept this submission from the Bar because the project manager who affirmed the affidavit in support of the application to set aside the judgment has referred to her as the company secretary.

However, it would have cleared matters if the process server had filed a further affidavit explaining why he chose to effect service by way of O. 62 r. 4(1)(c), ie, by handing a copy of the summons to the secretary instead of any of the other methods. He ought to have also explained why he did not endorse on the writ the fact that the secretary had refused to sign acknowledgment of receipt of the summons.

The plaintiff had stated that it had sent three letters demanding payment of the sum of RM479,276.28 to the defendant and had received no response. It has to be noted that two of the said three letters were issued on the same day to different addresses which have remained unanswered. I am of the view that there is nothing in law that allows an inference to be drawn from an unanswered letter of demand unless it is a statutory letter of demand such as a notice pursuant to s. 218 of the Companies Act 1965. A non reply can equally infer admission of the claim as well as a rejection of same which did

not merit a reply. In the circumstances I cannot therefore infer in favour of the plaintiff, because of the defendant's lack of response to the three letters.

In *Evans v. Bartlam* [1937] 2 All ER 646 the writ was served personally upon the appellant, who did not enter an appearance, and judgment was signed against him in default of appearance. In response to a request by the respondent's solicitor for payment of the sum due under the judgment, the appellant asked for time to pay, which was granted. Thereafter the appellant made an application to have the judgment set aside, and for leave to defend the action. The application was dismissed by the master; on appeal the judge in chambers granted the application and gave leave to defend upon terms. The Court of Appeal by a majority directed that the order of the master be restored. The House of Lords set aside the order of the Court of Appeal and restored the order of the judge in chambers. Lord Wright had this to say at p. 656:

> ... He has been guilty of no laches in making the application to set aside the default judgment, though, as *Atwood v. Chichester* ([1878] 3 QBD 722) and other cases show, the court, while considering delay, has been lenient in excluding applicants on that ground. The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms, as to costs, or otherwise, which the court, in its discretion, is empowered by the rule to impose. The appellant here has an explanation, the truth of which is indeed denied by the respondent, but at this stage I see no reason why he should be disbelieved on what appears to me to be a mere conflict on affidavits ...

If act A could have been done to show that act B was indeed done then the failure to perform act A could well result in the court accepting the submission that act B could not have been done. There is therefore in my mind a doubt as to whether the writ was indeed served on the defendant.

On the other hand, the respondent/plaintiff referred me to *Haigh v. Haigh* [1886] 31 Ch D 478 where the defendant to an action disobeyed an order to produce documents for inspection; her defence was struck out, and judgment given against her in default of a defence. There was evidence that her solicitor had explained to her the effect of the order for production and the consequence of disobeying it. The court refused to set aside the judgment on any terms. Pearson J in refusing to apply the rule relating to setting aside a default judgment in this case said at p. 484:

> ... It seems to me that there is no case which has gone to shew that this rule can be acted upon where the party who seeks to put it in force has, with full knowledge and wilfully, allowed judgment to go by default. ...

But that is not the case here. In the present case clearly there is no question of the default being allowed to be taken with full knowledge of the defendant and wilfully.

No Prejudice To The Plaintiff

In any event since obtaining judgment against the defendants on 23 August 1994 the plaintiff has chosen to hold the judgment inactive. They made no efforts to enforce payment nor did they serve the order on the defendants. Had the plaintiff done so upon obtaining judgment the defendant could have applied under O. 42 r. 13 of the RHC to set aside the said judgment within thirty days after the receipt of the order by them.

Defence On The Merits

The next issue is to see if the defence has raised merits. The defendant averred in its affidavit in support of its application for stay that the plaintiff was to supply granite slabs according to the quality guidelines provided by the architect. However, it was contended that the plaintiff consistently delivered granite slabs of an inferior quality to that specified which forced the defendant to reject or repair considerable quantities of the same (exh. SS-5 – being 7 letters from the defendant to the plaintiff complaining of the inferior and defective quality of the slabs supplied).

The plaintiff, on the other hand, stated that in none of the exhibits annexed to encl. 1 had the defendant contended that the reason for non payment was due to defective quality of marble slabs and the delay in delivering the same. The plaintiff then submitted that such allegations were not credible or *bona fide* to raise triable issues.

Whilst a study of the 7 letters of complaint exhibited as SS-5 in encl. 1 from the defendant to the plaintiff regarding poor quality of the goods and the delay, do not state that the defendant would refuse to make payment, clearly his omission to make such a statement cannot be held against the defendant. The defendant needed the supply from the plaintiff and to my mind it was nothing but circumstances that compelled both parties to continue to perform their respective part of the contract and to reserve their rights to pursue the relevant remedies open to each.

The plaintiff relied on *Yew Leek Enterprise Sdn Bhd v. Foong Engineering & Constructions Works Sdn Bhd* [1990] 2 MLJ 62 to show how a court can determine that there is no defence on the merits and contended that the facts in Yew Leek were similar to the present case.

It is pertinent for me to therefore compare the facts relating to the allegation of merits in both the cases. In *Yew Leek,* VC George J (as his Lordship then was) said at p. 63:

> The plaintiffs also contended that the defendants have not disclosed any plausible defence on merit. I agree. The claim was for goods sold and delivered. In support of their contention that they have a defence and counterclaim, the defendants say that some of the goods purchased from the plaintiffs and resold or supplied to the defendants' customers were defective. The value of the counterclaim is said to be in the region of some $380,000. However, the only evidence of complaint made by the defendants to the plaintiffs of defective material prior to the application to set aside is one letter that refers to three worm screws valued at some $2,400 in respect of which in any event it would appear that the plaintiffs had given the defendants a credit note. It seems to me implausible that the defendants have a *bona fide* complaint in that the defendants who had taken the trouble to write and make a claim for the defective worm screws worth $2,400 have not made any complaint prior to being sued in respect of the rest of the items they now complain about. Further, the letters produced purported to have been received from the customers of the defendants do not suggest that the items complained of are items supplied by the plaintiffs. Accordingly, unless the judgment was an irregular judgment, the appeal should fail.

On the other hand, in the present case 7 letters detailing clear defective quality of goods supplied have been shown. It has also been pointed out that there was a total delay of 66 days. The defendant has given details of the proposed counterclaim it intends to file. Far from having similar facts the dissimilarity is too wide for *Yew Leek* to bear relevance to the instant case. Whilst the plaintiff contends that the number of defective marble slabs was small as compared to the total supplied the defendant's complaint reveals that there was colour variation of the supply of granite which was, to quote, "quite drastic as compared to the granite colour control samples provided to us during our first factory inspection" and there was an invitation to the plaintiff to visit the site to inspect the granite for themselves. Whether there is a small quantity or a large quantity of defective material the possible counter claim of the defendant shows a substantial claim.

I am inclined to follow the decision of Zakaria Yatim J (as his Lordship then was) in *P.L. Construction Sdn Bhd v. Abdullah bin Said* [1989] 1 MLJ 60 wherein the learned judge held that the term 'defence on the merits' means a defence which discloses an arguable and triable issue.

The plaintiff submitted that it is not sufficient for the defendant to show a merely 'arguable' defence and that it must have a real prospect of success and carry some degree of conviction. For this the plaintiff relied on a passage

from the Supreme Court Practice 1995 which passage was derived from a decision of the English Court of Appeal in *Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc (The "Saudi Eagle")* [1986] 2 Lloyd's Law Reports 221.

This kind of robust approach has yet to find favour within our shores. In *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 MLJ 40 SC Lee Hun Hoe CJ (Borneo) stated the principle at p. 41 as follows:

> A defence on the merits means merely raising only an arguable or triable issue, eg, contributory negligence in a running down case in *White v. Weston* ([1968] 2 QB 647). A judgment in default is not a judgment on the merits: *L Oppenheim & Co v. Mahomed Haneef* ([1922] 1 AC 462).

A further ground raised by the defence was delay. Pursuant to the contract the plaintiff was to supply 3,530 square meters of granite slabs to the defendant by a particular schedule. The schedule for delivery of the granite slabs as set out in the contract was an essential part of the contract, in that any delay in delivery would delay the defendant's work on the project and the defendant was liable to its employers for liquidated and ascertained damages for any delay. Pursuant to the contract the final delivery of the granite slabs by the plaintiff was to have been on or before 16 November 1992. However the plaintiff only completed delivery of the granite slabs on 22 January 1993, ie, 66 days later, and this led to the defendant being unable to complete its work on the project on schedule, ie, by the first week of January 1993. The defendant thus argues that this clearly demonstrated a breach of the contract on the part of the plaintiff. In their affidavit in reply the plaintiff contended that any reference to defective goods related only to an insignificant quantity which was in any event replaced. I find that the plaintiff had not traversed the allegation of inferior quality.

With regard to the delay, the plaintiff argues that no documentary proof has been produced regarding the delay. This is totally incorrect. In exhibits to encl. 12 marked as exh. SS-6 are a number of letters from the defendant to the plaintiff complaining of the delay. In fact in their letter dated 5 January 1993 the defendant complained to the plaintiff as follows:

> Our Ref: MH 1327/08-MK3310/93
>
> 5 January 1993
>
> TAN CHIANG BROTHER'S MARBLE (S) PTE LTD
> No. 34 Sungei Kadut Street 1
> Sungei Kadut Industrial Estate
> Singapore 2572

Attention: Mr. Han Lik Kwang

Dear Sir

RE : WISMA INAI, KUALA LUMPUR
Supply of Granite Slabs

1. Please find enclosed a list of rejected granite slabs, the balance outstanding and excess granite delivered to our factory.

2. As you are aware, this project is coming towards completion and we are still waiting for you to complete your delivery in a satisfactory manner. Your delay is severely affecting our production schedule, and it is most urgent you attend to this immediately.

3. We will like to remind you that any loss an/or expenses incurred by us as a result of your delay in fulfilling your obligations will be passed to you as stipulated in Item 8 of our Letter of Award and Item 2 of the Terms and Conditions of the Supply Contract.

4. PLEASE TREAT THIS MATTER WITH THE UTMOST URGENCY.

Yours faithfully

LIGHTWEIGHT CONCRETE SDN BHD

Sgd.
Project Manager
Tan Thui Seng

The same tenor is reflected in the defendant's facsimile to the plaintiff dated 11 January 1993, another facsimile also dated 11 January 1993, and subsequently on 13 January 1993 and 14 January 1993.

Further the defendant had clearly demonstrated a counter claim giving details of same amounting to RM578,680, particulars of which are as follows:

Tuntutan Balas

23. Penghantarserahan papak granit kualiti rendah, penolakannya atau pembaikannya dan kelewatan penghantarserahan papak granit pada keseluruhannya telah menyebabkan defendan menanggung kerugian dan kerosakan. Berhubung dengan ini, saya dinasihatkan oleh peguamcara defendan dan dengan hormatnya menyatakan bahawa defendan mempunyai tuntutan balas yang substansial terhadap plaintif yang boleh dibutirkan seperti berikut:

(a) Kehilangan Produktiviti (tempoh Pengeluaran 5.10.1992 hingga 30.11.1992) hasil yang dijadualkan – 10 panel sehari hasil sebenar – 6 panel sehari kehilangan produktiviti 8 minggu @ 6 hari seminggu @ 4 panel sehari @ RM800.00 setiap panel RM153,600.

(b) Pencepatan Penghasilan (kerana kelewatan penghantarserahan)

(i) Acuan Tambahan sebanyak 4 @ RM50,000	RM200,000
(ii) Tenagakerja tambahan 429 panel @ RM120 setiap panel	RM 51,480

c) Lama Berada di Tapakbina

(i) 1 kren mobil tambahan di tapakbina 2 x 64 hari @ RM350 sehari	RM 44,800
(ii) Penyelia dan tenagakerja tambahan 64 hari @ RM450 sehari	RM 28,800

(d) Pembaikan, pembetulan panel (disebabkan saiz warna dan pewarnaan yang salah) 200 panel @ RM500 setiap panel	RM100,000
Jumlah Tuntutan Balas	RM578,680

Based on *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 I find that there are plainly triable issues in this case.

In the circumstances, I allowed the defendant's appeal and set aside the judgment in default of appearance dated 23 August 1994.

Stay Of Further Proceedings Pursuant To Section 6 Of The Arbitration Act 1952

The second prayer of the defendants was to apply for a stay of all further proceedings pending the referral of the dispute to arbitration pursuant to s. 6 of the Arbitration Act 1952. The agreement between the parties exh. SS-1 annexed to encl. 12 (cl. 2.4.) clearly provides for:

> ... any difference, discrepancy or dispute arising in respect of interpretation and performance of this supply contract or of any matters arising during or after the duration of this supply contract ... shall be referred to arbitration in accordance with the provision of the Malaysian Arbitration Act 1952 (Revised 1972).

The question is, is there a "difference, discrepancy or dispute" in this case.

The defendant relies on s. 6 of the Arbitration Act 1952 which reads as follows:

> 6. If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

I find that there is certainly a dispute both with regard to the quality of the titles supplied, and to the delay in supplying the same. Once I find as a fact that a dispute has arisen, the defendant is entitled to rely on s. 6 of the said Act to apply for a stay provided he has not taken any other steps in the proceedings and has shown his readiness and willingness to do all things necessary for the proper conduct of the arbitration. This the defendant has solemnly affirmed to do in its affidavit (encl. 12).

In this respect I rely on *Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459 and the judgment of Peh Swee Chin J (as his Lordship then was) at p. 460:

> It would be necessary to restate a few relevant basic principles of stay of action on ground of arbitration. Not only should there be a valid arbitration agreement, the applicant should apply for a stay before taking any step in the proceedings after appearance, and that applicant must satisfy the court that he was, at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration. Please see s. 6 of the Arbitration Act 1952. These few principles require elaboration later in regard to the negative requirement of not taking any other step in the proceedings after appearance.
>
> In the face of such an application from a defendant, the plaintiff will have the onus of showing that the matter ought not to be referred to arbitration. Please see the old case of *Drouth v. The Ship, "Paul Donmer"* ([1934] MLJ 72), and if the plaintiff fails to discharge that onus, the court will assume there is no sufficient ground for not granting a stay. In exercising its discretion, it is the *prima facie* duty of the court to act upon such an arbitration agreement: per Lord Selbourne L.C. in *Willesford v. Watson* ([1873] 8 Ch. App. 473, 480).

The plaintiff however argued relying on *Hashim bin Majid v. Param Cumaraswamy & Ors* [1993] 2 MLJ 20, 24 that the defendant ought to have replied their three demand notices and that the defendant ought not to have entertained any fear of their replies being construed as a step in the proceedings.

In fact the plaintiff emphasised that bringing a court action in the face of an arbitration clause is not bad per se and referred me to *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena)* [1996] 1 CLJ 231. But I hold, as did the Federal Court, that this court could, in the exercise of its discretion, stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration.

Since I have found that there are arguable and triable issues raised, I find that a dispute exists between the parties which ought to be referred to arbitration. I draw to mind the reminder of Gopal Sri Ram JCA in *Tan Kok Cheng (supra)* where his Lordship said at p. 281:

> ... When considering an application under s. 6 of the Act, it is no part of the court's function to decide whether the defendant has raised a *bona fide* dispute warranting a stay. The strength or weakness of the issues raised by a defendant must await the decision of the tribunal especially chosen by the parties to decide the differences that have arisen between them. It is only in plain and obvious cases, where a reasonable tribunal, without undertaking a meticulous examination of the merits, is bound to hold that the issues raised by a defendant are frivolous or vexatious, that a court may be justified in refusing a stay.

I therefore granted the defendant's second prayer and stayed all proceedings and referred the same to arbitration pursuant to s. 6 of the Arbitration Act 1952.

Costs

On the issue of costs the defendant prayed for the costs of this application. The plaintiff however retorted that whatever the outcome of this appeal the costs ought to be borne by the defendant. In *Wright v. Mills* [1889] 60 LTR 887 the defendant allowed for in default judgment to be entered against him. Kay J allowed the application to set aside the default judgment on terms that all costs occasioned to the plaintiff by the defendant's default must be paid by the defendant to the plaintiff including the costs of the present application. I agree with this proposition. I therefore awarded costs to the plaintiff in any event including costs of this application.

Reported by Ivan Ang